Bangkok Bank Bhd v Tan Ngee Hong Construction Sdn Bhd (Malayan Banking Bhd, proposed intervener)

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) PETITION NO WA-28NCC-362–04 OF 2018
AZIZUL AZMI ADNAN J
14 MAY 2019

Companies and Corporations — Winding up — Petition — Petitioner sought to wind up respondent company — Proposed intervener applied for its nominated liquidator to be appointed — Whether petition should be allowed — Whether proposed intervener/applicant could apply for its nominated liquidator to be appointed — Whether proposed intervener/applicant failed to file notice of intention to appear within stipulated time — Whether it would be appropriate to appoint liquidator nominated by proposed intervener to act as liquidator of company — Companies Act 2016 s 465(1)(e) — Rules of Court 2012 O 15 r 6(2)(b) & (3) — Companies (Winding-Up) Rules 1972 r 28

The petitioner sought to wind up the respondent's company, Tan Ngee Hong Construction Sdn Bhd ('the company') on grounds that the respondent was unable to pay its debts, pursuant to s 465(1)(e) of the Companies Act 2016. Malayan Banking Bhd ('Maybank') made an application for its nominated liquidator to be appointed should the court see it fit to allow the petition. The company was a construction company engaged in the housing sector. It had obtained overdraft and revolving credit facilities from Bangkok Bank. It defaulted on those facilities. Bangkok Bank sued and obtained judgment against the company on 14 August 2014. The company did not enter appearance to defend the suit. The principal of the amounts claimed by Bangkok Bank was approximately RM1.4m. Bangkok Bank issued a statutory notice of demand pursuant to s 466(1)(a) of the Companies Act 2016 to the company. This demand was dated 26 September 2017. The company put forth two proposals for settlement to Bangkok Bank, both of which were rejected. On 17 April 2018, Bangkok Bank petitioned for the company to be wound up. In its petition, Bangkok Bank prayed for the official receiver to be appointed as the liquidator of the company. Maybank had also granted credit facilities to the company. Its credit facilities to the company were much larger than Bangkok Bank. As at 30 September 2017 the total outstanding owed to Maybank by the company was more than RM27m and Maybank had obtained a summary judgment for this amount. Maybank sought for a private liquidator to be appointed ('Maybank's application') in the winding up of the company, as it

considered that, due to the nature of the company's business and assets, it would be beneficial for a private liquidator with the appropriate commercial expertise to be appointed.

Held, allowing the petitioner's petition and Maybank's application:

(1) Maybank was clearly a creditor of the company. A creditor or contributory need not apply to intervene, for it is automatically a party to the petition. There was thus no procedural requirement placed on Maybank to have complied with the rules relating to joinder of parties set out in O 15 r 6(2)(b) of the Rules of Court 2012 (see paras 11–12).

(2) As long as Maybank had served its notice of intention to appear on Bangkok Bank or its solicitors Messrs Sidek Teoh Wong & Dennis no later than noon on the day preceding the date fixed for the rescheduled hearing in October, there would have been in compliance with r 28. There was nothing to support the contention of counsel for the company that such notice must have been served on the petitioner or its counsel on the original date fixed for the hearing of the petition, rather than the date on which the petition was actually heard (see paras 15–16).

(3) It was patent and obvious that the solicitors for the petitioner had failed to correctly identify Maybank as the party on whose behalf of the notice of intention to appear had been filed by Messrs Adnan Sundra & Low. The only logical and reasonable conclusion was that Maybank, through its solicitors had indeed given the notice in Form 8 to Messrs Sidek Teoh Wong & Dennis within the prescribed timeframe. The objection of the company was therefore not made out (see para 20).

(4) The crux is the failure to make payment following a valid demand; a neglect or refusal to meet the statutory demand will give rise to a presumption of insolvency on the part of the debtor company, which in turn provides a legitimate basis for the company to be wound up. Nonetheless, a neglect or refusal may not be determinative because it will be open to the debtor company to adduce credible evidence to rebut the presumption of insolvency. But it cannot successfully rebut this presumption on grounds that it refuses to pay not that it is unable to pay (see paras 26–28).

(5) In this case, Bangkok Bank had obtained a judgment in default of appearance against the company. This judgment that had not been stayed or set aside. Even if the company was able to pay its debts as and when they became due and had a substantial asset surplus, where the debt in question was a judgment debt (which judgment had not been stayed or set aside) it would be open to the company to resist the operation of the

presumption arising as a consequence from s 466(1) of the Companies Act 2016 (see paras 31–32).

(6) The proposed liquidator in this case, Mr Lim Tian Huat, possessed impeccable credentials. He headed a firm of specialist insolvency professionals and was the co-author of the seminal text 'Corporate Receivership: The Law and Practice in Malaysia and Singapore'. He was an advisor in the establishment of Pengurusan Danaharta Nasional Bhd and the Corporate Debt Restructuring Committee of Bank Negara. He had also acted as court-appointed receiver and manager to revive abandoned housing projects. The court was of the view that the creditors of the company would greatly benefit from his appointment as liquidator (see paras 36–37).

[Bahasa Malaysia summary

Pempetisyen ingin menggulungkan syarikat responden, Tan Ngee Hong Construction Sdn Bhd ('syarikat tersebut') atas sebab-sebab bahawa responden tidak dapat membayar hutang-hutang, menurut s 465(1)(e) Akta Syarikat 2016. Malayan Banking Bhd ('Maybank') membuat permohonan untuk mencalonkan penyelesai untuk dilantik sekiranya mahkamah berpendapat ia adalah wajar untuk membenarkan petisyen. Syarikat tersebut adalah syarikat pembinaan yang terlibat dengan sektor perumahan. Ia telah mendapatkan overdraf dan kemudahan kredit berterusan daripada Bangkok Bank. Ia tidak dapat menjelaskan bayaran ke atas kemudahan-kemudahan tersebut. Bangkok Bank menyaman dan mendapatkan penghakiman terhadap syarikat tersebut pada 14 Ogos 2014. Syarikat tersebut tidak memasukkan kehadiran untuk mempertahankan saman. Jumlah prinsipal yang dituntut oleh Bangkok Bank adalah lebih kurang RM1.4 juta. Bangkok Bank menghantar notis statutori permintaan menurut s 466(1)(a) Akta Syarikat 2016 syarikat tersebut. Permintaan ini bertarikh 26 September 2017. Syarikat tersebut mengemukakan dua cadangan untuk penyelesaian kepada Bangkok Bank, yang mana kedua-duanya telah ditolak. Pada 17 April 2018, Bangkok Bank mengemukakan petisyen kepada syarikat tersebut untuk penggulungan. Dalam petisyennya, meminta untuk penerima rasmi dilantik sebagai penyelesai syarikat tersebut. Maybank juga telah memberikan kemudahan kredit kepada syarikat tersebut. Kemudahan kreditnya kepada syarikat adalah jauh lebih besar daripada Bangkok Bank. Setakat 30 September 2017 jumlah yang terhutang kepada Maybank oleh syarikat tersebut adalah lebih daripada RM27 juta dan Maybank telah mendapatkan penghakiman terus untuk jumlah ini. Maybank meminta penyelesai persendirian untuk dilantik ('permohonan Maybank') di dalam penggulungan syarikat tersebut, memandangkan, oleh kerana bentuk perniagaan syarikat dan aset-aset, ia adalah bermanfaat untuk penyelesai persendirian dengan kemahiran komersial

yang sesuai untuk dilantik.

Diputuskan, membenarkan petisyen pempetisyen dan permohonan Maybank:

(1) Maybank jelas merupakan pemiutang kepada syarikat tersebut. Pemiutang atau keperluan penyumbangan tidak perlu membuat permohonan untuk mencelah, kerana ia adalah secara automatik berpihak kepada petisyen. Oleh itu, tiada keperluan prosedur diletakkan kepada Maybank untuk menurut peraturan-peraturan berkenaan kemasukan pihak-pihak seperti yang ternyata di dalam A 15 k 6(2)(b) Kaedah-kaedah Mahkamah 2012 (lihat perenggan 11–12).

(2) Selagi Maybank telah menyampaikan notis niat untuk hadir kepada Bangkok Bank atau peguamcaranya Tetuan Sidek Teoh Wong & Dennis tidak lewat daripada tengahhari pada tarikh yang telah ditetapkan untuk pendengaran yang telah dijadualkan semula pada Oktober, ia telah mengikut peraturan 28. Tiada apa-apa yang boleh menyokong penyataan peguam untuk syarikat tersebut bahawa notis seumpamanya mesti disampaikan kepada pempetisyen atau peguamnya pada hari asal yang telah ditetapkan untuk pendengaran petisyen, jika dibandingkan dengan tarikh yang mana petisyen sepatutnya didengar (lihat perenggan 15–16).

(3) Ia adalah nyata dan jelas bahawa peguamcara pempetisyen telah gagal untuk secara betul mengenal pasti Maybank sebagai pihak yang mana notis niat untuk hadir telah difailkan oleh Tetuan Adnan Sundra & Low bagi pihaknya. Kesimpulan logik dan wajar hanyalah bahawa Maybank, melalui peguamcaranya telah memberikan notis dalam Borang 8 kepada Tetuan Sidek Teoh Wong & Dennis dalam garis masa yang telah ditetapkan. Bantahan syarikat tersebut dengan ini tidak dapat dibuat (lihat perenggan 20).

(4) Puncanya ialah kegagalan untuk membuat bayaran mengikut tuntutan yang sah; keabaian atau kegagalan untuk melangsaikan permintaan statutori akan memberikan andaian insolvensi atas syarikat penghutang, yang mana memberikan asas sah untuk syarikat tersebut digulungkan. Walau bagaimanapun, penggabaian atau kegagalan mungkin tidak menjadi penentu kerana ia akan terbuka untuk syarikat pemiutang untuk mengemukakan keterangan yang dipercayai untuk menangkis andaian insolvensi. Tetapi ia tidak boleh dengan jayanya menangkis andaian ini atas sebab-sebab bahawa ia tidak mahu membayar bukan ia tidak mampu membayar (lihat perenggan 26–28).

(5) Di dalam kes ini, Bangkok Bank telah mendapat penghakiman tiada kehadiran terhadap syarikatt tersebut. Penghakiman ini tidak ditangguh

atau diketepikan. Jikalau pun syarikat tersebut mampu membayar hutang-hutangnya apabila ia terhutang dan mempunyai aset lebihan yang banyak, di mana hutang yang dipersoalkan adalah hutang penghakiman (yang mana penghakiman tidak ditangguhkan dan diketepikan) ia adalah terbuka kepada syarikat untuk mempertahankan operasi atas andaian yang berasaskan akibat daripada s 466(1) Akta Syarikat 2016 (lihat perenggan 31–32).

(6) Penyelesai yang dicadangkan di dalam kes ini, En Lim Tian Huat, mempunyai kelayakan yang baik. Beliau mengetuai firma pakar insolvensi profesional dan merupakan penulis bersama teks seminal 'Corporate Receivership: The Law and Practice in Malaysia and Singapore'. Beliau merupakan penasihat untuk pertubuhan Pengurusan Danaharta Nasional Bhd dan Corporate Debt Restructuring Committee Bank Negara. Beliau juga telah bertindak sebagai penerima yang dilantik mahkamah dan pengurus untuk memulihkan projek-projek perumahan yang terbengkalai. Mahkamah berpandangan bahawa pemiutang-pemiutang syarikat tersebut akan mendapat faedah penuh daripada perlantikan beliau sebagai penyelesai (lihat perenggan 36–37).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1801–1973.

Cases referred to

Ambank (M) Bhd v Malaysian Coal & Minerals Corp Sdn Bhd [2016] 11 MLJ 590; [2016] 1 AMCR 838, HC (refd)

Cornhill Insurance Plc v Improvement Services Ltd and Others [1986] 1 WLR 114, Ch D (refd)

ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177; [1984] 2 MLRH 239 (refd)

Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1) [1998] 1 MLJ 99; [1997] 4 AMR 4113; [1998] 1 CLJ 285; [1997] 2 MLRA 100, CA (refd)

Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 AMR 685; [2011] 1 CLJ 947; [2010] 3 MLRA 263, CA (refd)

Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668, CA (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 28, Form 8

Companies Act 1965 (repealed by the Companies Act 2016) ss 465(1)(e)

A Companies Act 2016 ss 465(1)(e), 466(1), (1)(a), (1)(b), (1)(c), (1)(e)
Rules of Court 2012 O 15 r 6(2), (2)(b), (2)(b)(i), (2)(b)(ii), (3)

Azizul Azmi Adnan J:

B INTRODUCTION

[1] The petitioner in this case, Bangkok Bank Bhd, sought to wind up the respondent company, Tan Ngee Hong Construction Sdn Bhd ('the company'), on grounds that the respondent was unable to pay its debts, pursuant to
C s 465(1)(e) of the Companies Act 2016. Malayan Banking Bhd ('Maybank') made an application for its nominated liquidator to be appointed should the court see fit to allow the petition.

[2] I allowed the petition as well as Maybank's application for its nominated
D liquidator to be appointed in respect of the company. The grounds for these decisions are recorded here.

Material background facts

E **[3]** The company is a construction company engaged in the housing sector. It had obtained overdraft and revolving credit facilities from Bangkok Bank. It defaulted on those facilities. Bangkok Bank sued, and obtained judgment against the company on 14 August 2014. The company did not enter appearance to defend the suit. The principal of the amounts claimed by
F Bangkok Bank was approximately RM1.4m.

[4] Bangkok Bank issued a statutory notice of demand pursuant to s 466(1)(a) of the Companies Act 2016 to the company. This demand was dated 26 September 2017.
G

[5] The company put forth two proposals for settlement to Bangkok Bank, both of which were rejected. On 17 April 2018, Bangkok Bank petitioned for the company to be wound up. In its petition, Bangkok Bank prayed for the
H official receiver to be appointed as the liquidator of the company.

[6] On 1 October 2018, Maybank made an application to nominate a private liquidator. Maybank's position was that, should the court consider it appropriate for the company to be wound up, then the court should appoint its
I nominated liquidator as the liquidator of the company.

[7] Maybank had also granted credit facilities to the company. Its credit

facilities to the company were much larger those of Bangkok Bank. As at 30 September 2017 the total outstanding owed to Maybank by the company was more than RM27m. Maybank obtained a summary judgment for this amount.

[8] Maybank sought for a private liquidator to be appointed in the winding up of the company, as it considered that, due to the nature of the company's business and assets, it would be beneficial for a private liquidator with the appropriate commercial expertise to be appointed.

MAYBANK'S APPLICATION

The applicability of O 15 r 6(2)

[9] Counsel for the company opposed Maybank's application. He referred to the case of *Ambank (M) Bhd v Malaysian Coal & Minerals Corp Sdn Bhd* [2016] 11 MLJ 590; [2016] 1 AMCR 838 for the proposition that Maybank ought to have complied with the provisions of O 15 r 6(2)(b) and (3) of the Rules of Court 2012, which provides for the joinder of parties. It was contended that Maybank must show to the court that its presence was necessary for the effectual and complete determination of the matters in dispute (sub-r 2(b)(i)) or that there exists an issue arising out of any relief or remedy claimed which would be just and convenient to determine as between Maybank on the one hand, and Bangkok Bank and the company on the other (sub-r 2(b)(ii)).

[10] In my judgment, counsel's reliance on *Ambank (M) Bhd v Malaysian Coal & Minerals Corp Sdn Bhd* was misplaced. In that case, the court was concerned with the right of a proposed intervener who was neither a creditor nor a contributory to the respondent company (the proposed intervener in that case was a purchaser of real property belonging to the respondent company). Because the Companies (Winding-Up) Rules 1972 are silent on the status of a proposed intervener who was neither a creditor nor a contributory, resort must be had to the Rules of Court 2012 to address the procedural lacuna. For this reason, it became necessary for the proposed intervener to fulfil the requirements of O 15 r 6(2)(b) before it may be permitted to intervene in the petition.

[11] By contrast, in the present case, Maybank was or is very clearly a creditor of the company. A creditor or contributory need not apply to intervene, for it is automatically a party to the petition. This is explained by Mahadev Shankar JCA in *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)*

A [1998] 1 MLJ 99; [1997] 4 AMR 4113; [1998] 1 CLJ 285; [1997] 2 MLRA 100:

> The point to note here is that in a s 218 petition, the service is by advertisement. Consequently, all creditors and contributories are 'parties' who are deemed to be served and can participate in the proceedings. Whether or not they appear, they will be bound by the winding up order because s 226(4) of the Act deems that a winding up order is made on the joint petition of all creditors and contributories. When it comes to appealing, we adopt Lindley LJ's remarks in *Re Securities Insurance Company* [1894] 2 Ch D 410 at p 413 where he said:
>
> > I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party, is either bound by the order, or is aggrieved by it, or is prejudicially effected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a prima facie case why he should have leave, he will get it, but without leave he is not entitled to appeal.
>
> And later on at p 413 he concluded:
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> > I think the rule under the old Chancery practice is perfectly well settled; and even in the winding up of companies with which I was once familiar, I do not recollect a case of a person who alleged himself to be aggrieved appealing without leave, he had in some way or other made himself a party to the proceedings.

So a contributory or creditor in a winding up is a party and not an intervener in the sense of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668, who sought to inject themselves into the proceedings.

[12] There was thus no procedural requirement placed on Maybank to have complied with the rules relating to joinder of parties set out in O 15 r 6(2)(b) of the Rules of Court 2012.

Notice of intention to appear

[13] It was contended by counsel for the company that Maybank had failed to file a notice of intention to appear within the stipulated time. Under r 28 of the Companies (Winding-Up) Rules 1972, a person who intends to appear at the hearing of a petition must serve on the petitioner or its solicitor notice of his intention. This notice, the form of which is prescribed in Form 8, must be served no later than 12 noon on the day before the hearing of the petition.

[14] The hearing of the petition had originally been fixed on 26 June 2018, but adjourned on application of the petitioner Bangkok Bank due to settlement negotiations taking place between the parties. The petition

was re-fixed for 21 August 2018, but it was again adjourned, this time on application of the company, whose sole director had been hospitalised and could not respond to a request from the petitioner for its settlement offer to be improved. At the next date, 21 September 2018, parties again requested an adjournment in view of a pending settlement. The court acceded to this request and re-fixed the petition for 23 October 2018 but informed parties that no further adjournments would be granted.

[15] I am of the view that, as long as Maybank had served its notice of intention to appear on Bangkok Bank or its solicitors Messrs Sidek Teoh Wong & Dennis no later than noon on the day preceding the date fixed for the rescheduled hearing in October, there would have been compliance with r 28.

[16] There is nothing to support the contention of counsel for the company that such notice must have been served on the petitioner or its counsel on the original date fixed for the hearing of the petition, rather than the date on which the petition was actually heard.

[17] Was a notice so served?

[18] The solicitors for the petitioner Bangkok Bank had filed the *Senarai Nama Pihak-pihak Yang Akan Menghadiri Pendengaran Petisyen* on 22 October 2018 (see encl 27). This list contained a table of the parties who had given notice of intention to appear, which I reproduce below:

Nama	Alamat	Nama dan alamat peguamcara pihak yang telah memberikan notis	Pemiutang jumlah hutang	Penyumbang No Saham	Pembangkang	Penyokong
Tan Ngee Hong Construction Sdn Bhd	Unit No 568–9–10 & 9–11 Kompleks Mutiara 3 1/2 Miles Jalan Ipoh 51200 Kuala Lumpur	Messrs Arthur Wang, Lian & Associates Unit No 568–9–10 & 9–11 Kompleks Mutiara 3 1/2 Miles Jalan Ipoh 51200 Kuala Lumpur	–	–	Ya	–
Tan Ngee Hong Construction Sdn Bhd	Unit No 568–9–10 & 9–11 Kompleks Mutiara 3 1/2 Miles Jalan Ipoh 51200 Kuala Lumpur	Messrs Adnan Sundra & Low Level 11 Menara Olympia No 8 Jalan Raja Chulan 50200 Kuala Lumpur	–	–	–	Ya

[19] It is apparent on the face of this document that it contains an error. The respondent company's name appears twice, once as a party opposing the petition, and another in support of it. The names of the solicitors giving the notices were different: Messrs Arthur Wang, Lian & Associates were correctly

identified as the solicitors for the company. Messrs Adnan Sundra & Low, however, were not the company's solicitors. They were in fact solicitors acting for Maybank.

[20] It is patent and obvious that the solicitors for the petitioner had failed to correctly identify Maybank as the party on whose behalf the notice of intention to appear had been filed by Messrs Adnan Sundra & Low. The only logical and reasonable conclusion was that Maybank, through its solicitors, had indeed given the notice in Form 8 to Messrs Sidek Teoh Wong & Dennis within the prescribed time frame. The objection of the company was therefore not made out.

THE PETITION

[21] Bangkok Bank petitioned the court for the company to be wound up under s 465(1)(e) of the Companies Act 2016, on grounds that it was 'unable to pay its debts'. Section 466(1) provides for the circumstances under which the statutory presumption that a company is unable to its debts: first, where the company neglects to pay within 21 days after service of a demand under s 466(1)(a); secondly under s 466(1)(b), where the execution process post-judgment is returned unsatisfied; and thirdly under s 466(1)(c), where the court determines that the company is unable to pay its debts taking into account the contingent and prospective liabilities of the company. Section 466(1)(a) provides as follows:

> Section 466 Definition of 'inability to pay debts'
>
> (1) A company shall be deemed to be unable to pay its debts if —
>
> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

[22] In this case, Bangkok Bank was pursuing the winding up of the company on the basis of s 466(1)(e), and were relying on the statutory presumption under s 466(1)(a). A failure to pay within the stipulated period of three weeks will give rise to the statutory presumption that the company is unable to pay its debts to all its creditors. The presumption arising from the neglect to meet the demand confers on the court the jurisdiction to grant a winding up order on the basis of s 465(1)(e) of the Companies Act 1965. This presumption is, however, rebuttable. It will then be for the debtor company to demonstrate that it is able to pay all its debts at the material time.

[23] A neglect to pay will justify the winding up of a company in debt, for it will be presumed under s 466(1)(a) to be unable to pay its debts. A

[24] Can a debtor company refuse to pay and thereby avoid the statutory presumption of insolvency? In my view, it cannot. B

[25] A neglect to pay is not materially different from a refusal to pay. A 'refusal' connotes a deliberate decision whereas a 'neglect' is suggestive of an omission or a failure to apply the mind. It would be otiose if debtor company which claims to be solvent can defeat a winding up process by conveniently asserting that it can meet the debt claimed but simply refuses to do so. C

[26] The crux is the failure to make payment following a valid demand: a neglect or refusal to meet the statutory demand will give rise to a presumption of insolvency on the part of the debtor company, which in turn provides a legitimate basis for the company to be wound up. Nonetheless, a neglect or refusal may not be determinative because it will be open to the debtor company to adduce credible evidence to rebut the presumption of insolvency. D

[27] But it cannot successfully rebut this presumption on grounds that it refuses to pay not that it is unable to pay. In *Cornhill Insurance Plc v Improvement Services Ltd and Others* [1986] 1 WLR 114, it was held that where a creditor's debt is clearly established, the creditor has the right to present a winding up petition and obtain relief even though the company was solvent. The solvency of a company would count for nothing if it persists in non-payment or that it is nevertheless not ready, willing and able to meet the demand of the creditor. E F

[28] It is also well established that mere refusal to pay is not a dispute because a true dispute must refer not just to differences arising out of a refusal to do something but must relate to a controversy over some contestable matters (see for example *ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177; [1984] 2 MLRH 239). G

[29] I now turn to the Court of Appeal decision in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 AMR 685; [2011] 1 CLJ 947; [2010] 3 MLRA 263. In this case, it was held that, for as long as a judgment has not been stayed or set aside, there cannot be any bona fide dispute as to the amount of indebtedness payable under such judgment: H I

> A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point.

[30] The position in law may be summed up as follows:

(a) if a company refuses or neglects to pay a debt after 21 days of having received a notice issued pursuant to s 466(1)(a) of the Companies Act 2016, it will presumed to be unable to pay its debts;

(b) this presumption is rebuttable, and the company can rebut this presumption by adducing evidence that it is solvent, and by showing that the debt in question is disputed on substantial grounds;

(c) a debt cannot be a disputed debt if it arises out of a judgment or order of court that has not been stayed or set aside; and

(d) accordingly even if a company is able to pay its debts as they become due and has substantial asset surplus, but the debt in question is a judgment debt (which judgment has not been stayed or set aside) it will not be open to the company to resist the operation of the presumption arising as a consequence of s 466(1). To hold otherwise will allow a company to simply refuse to pay a judgment sum, by contending that it has not 'neglected to pay', but is making a positive and conscious decision to refuse to do so.

[31] In this case, Bangkok Bank has obtained a judgment in default of appearance against the company. This judgment that has not been stayed or set aside.

[32] Even if the company is able to pay its debts as and when they become due and has a substantial asset surplus, where the debt in question is a judgment debt (which judgment has not been stayed or set aside) it would not be open to the Company to resist the operation of the presumption arising as a consequence from s 466(1) of the Companies Act 2016.

[33] For this reason, I allowed the petition.

THE IDENTITY OF THE LIQUIDATOR

[34] The final question was whether it would be appropriate to appoint the liquidator nominated by Maybank to act as the liquidator of the company.

[35] It was not in material dispute that the company has substantial current assets arising from its construction business. According to its financial information lodged with the Companies Commission of Malaysia, as at 30 April 2016, its current assets were more than RM164m. Current liabilities on the other hand amounted to almost RM162m.

[36] The proposed liquidator in this case, Mr Lim Tian Huat, possessed impeccable credentials. He heads a firm of specialist insolvency professionals

and is the co-author of the seminal text 'Corporate Receivership: The Law and Practice In Malaysia and Singapore'. He was an advisor in the establishment of Pengurusan Danaharta Nasional Bhd and the Corporate Debt Restructuring Committee of Bank Negara. He also has acted as a court-appointed receiver and manager to revive abandoned housing projects.

[37] I was of the view that the creditors of the company would greatly benefit from his appointment as liquidator and I accordingly ordered so.

Petitioner's petition and Maybank's application allowed.

Reported by Addibah Adnan